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Preventing the Tail from Wagging the Dog: Why *Apprendi*'s Bark is Worse Than Its Bite

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PREVENTING THE TAIL FROM WAGGING THE DOG:

WHY *APPRENDI*'S BARK IS WORSE THAN ITS BITE

INTRODUCTION

Place yourself in the position of a white man accused of firing a gun into the home of a black family.[1] You agree to plead guilty to second-degree possession of a firearm, which carries a maximum penalty under state law of ten years in prison. At your sentencing hearing, the prosecutor asks the judge to sentence you to twenty years because your purpose was racial intimidation. Such a purpose violates the state's hate crime statute. The judge determines—by a preponderance of the evidence—that your crime was motivated by race and sentences you to twelve years in prison. You think this sentence enhancement violates your due process rights under the Fourteenth Amendment and your right to have a jury determine guilt— beyond a reasonable doubt—under the Sixth Amendment. The Supreme Court agrees with you, holding that the judge cannot increase the statutory maximum penalty by determining your motivation by a preponderance of the evidence. The "tail" cannot wag the "dog" of the substantive offense.[2]

While most people understandably have difficulty sympathizing with you, many experts hail your case as a watershed decision in the history of constitutional law—a decision that will send shock waves through the legal community and revolutionize sentencing.[3] A closer look, however, reveals the unremarkable nature of the Supreme

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[1] All of the facts in the Introduction are based on *Apprendi v. New Jersey*, 530 U.S. 466, (2000).

[2] *See Apprendi*, 530 U.S. at 495 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)) (holding that a possession finding is "a tail which wags the dog of a substantive offense" when it is used to increase the maximum punishment for the offense).

[3] *See* Brooke A. Masters, *High Court Ruling May Rewrite Sentencing*, WASH. POST, July 23, 2000, at A1. The article quotes several scholars and legal professionals, whose opinions reflect the general sentiment in the aftermath of *Apprendi*. Professor Susan Klein speculates that thirty-nine federal and twenty state laws may be unconstitutional and asserts "[i]t's just going to be a disaster." *Id.* Chief Judge Edward R. Becker of the Third Circuit calls it "a case of enormous potential importance" with which courts will "have to spend a lot of time dealing." *Id.* at A15.

Court's decision and the limited impact the decision will have. Granted, the decision will dramatically affect certain statutes, but for the most part judges will continue sentencing as usual. The current sentencing rule is no different from the one you were sentenced under: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[4] Congratulations, though, because your case forced the Supreme Court to provide a succinct statement of the law.

By examining *Apprendi*'s impact on criminal sentencing, this Note has a two-fold purpose.[5] First, it will show that a close reading of the Supreme Court sentencing cases preceding *Apprendi v. New Jersey* reveals the unsurprising nature of the decision. In fact, any other decision would have contradicted previous statements of the law. The Supreme Court has never allowed a judge to sentence above the statutory maximum based on factors determined by a preponderance of the evidence.[6]

Second, this Note will illustrate *Apprendi*'s potential impact through the use of two representative examples under federal law. There are many statutes—state and federal—that *Apprendi* could affect, including most hate crime statutes. This Note will focus on a federal drug statute[7] and a possible sentencing ramification under the Sherman Antitrust Act.[8] Generally, *Apprendi* will have a limited impact, but its effect on specific statutes could be dramatic and will greatly affect how the United States Government prosecutes possible offenders.

This Note is divided into three sections. Part I discusses the various opinions in the Supreme Court's five-to-four decision in *Apprendi v. New Jersey*.[9] Part II discusses the evolution of sentencing over the past thirty years. The analysis is divided into two subsections to illustrate the Court's acceptance of so-called "sentencing factors,"[10] which

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[4] *Apprendi*, 530 U.S. at 490.

[5] The purpose of this Note is *not* to discuss whether the Court was right or wrong, nor to discuss Apprendi's impact on the United States Sentencing Guidelines. Rather, the Note examines the historical evolution of sentencing and *Apprendi*'s future effects.

[6] As discussed below, an exception exists for prior convictions. The rationale, however, is that those convictions were determined by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 496 ("[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.").

[7] 21 U.S.C. § 841 (1994).

[8] 15 U.S.C. § 1 (1994).

[9] 530 U.S. 466 (2000).

[10] As expanded upon below, this term first appeared in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

the judge is allowed to consider by a preponderance of the evidence as long as the sentence remains within the statutory range. The Court first accepted sentencing factors in 1986, so Part II is divided into discussions of pre- and post-1986 cases.[11] Part III discusses the likely fallout after *Apprendi*. The decision will generally not have a major impact, because it will not operate retroactively,[12] and will not affect those sentences that are within the statutory range[13] or are enhanced due to prior convictions.[14]

Apprendi's effect on specific statutes, however, could be dramatic. This Note will focus on two federal statutes—one dealing with a street crime[15] and one dealing with a white-collar crime.[16] Basically, judges should no longer be able to impose sentences exceeding the statutory maximum by determining the amount of drugs involved by a preponderance of the evidence,[17] and the Antitrust Division of the United States Department of Justice ("DOJ") should no longer be able to use another statute[18] to obtain corporate fines in excess of those specified in the Sherman Act.[19] A sentencing factor cannot operate as "a tail which wags the dog of the substantive offense."[20]

I. CONTEXT: THE SUPREME COURT'S DECISION IN *APPRENDI V. NEW JERSEY*

In June 2000, the Supreme Court upheld *Miranda* warnings,[21] rejected a law prohibiting partial birth abortions,[22] and ruled that the Boy Scouts could ban homosexual leaders.[23] The controversial nature of these cases overshadowed another decision dealing with what most Americans consider a fundamental right—the right to have a jury of one's peers determine criminal guilt beyond a reasonable doubt. Before discussing the history behind *Apprendi* and its likely effects, we must first understand the decision itself. Thus, an in-depth explora-

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[11] *See infra* Parts II.A, II.B.
[12] *See infra* Part III.A.1.
[13] *See infra* Part III.A.2.
[14] *See infra* Part III.A.3.
[15] *See* 21 U.S.C. § 841 (1994) (dealing with drug-related offenses).
[16] *See* Sherman Act, 15 U.S.C. § 1 (1994) (dealing with restraints of trade).
[17] *See infra* Part III.B.1.
[18] *See* 18 U.S.C. § 3571 (1994) (dealing with fines for criminal offenses).
[19] *See infra* Part III.B.2.
[20] McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).
[21] Dickerson v. United States, 530 U.S. 428 (2000) (holding that *Miranda* may not be overruled by an act of Congress and declining to overrule *Miranda* itself).
[22] Stenberg v. Carhart, 530 U.S. 914 (2000) (holding that a Nebraska statute criminalizing partial birth abortions violates the Constitution).
[23] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that a New Jersey public accommodations law violates the Boy Scout's First Amendment right to expressive association).

tion of the several opinions that constituted the Supreme Court's majority and minority positions is warranted.

A. The Facts[24]

Charles Apprendi fired several shots into the home of a black family and gave police a statement—later retracted—that he did not want a black family moving into his all-white neighborhood. He was charged under New Jersey law with, among other things, second-degree possession of a firearm,[25] which carries a prison term of five to ten years. Apprendi pled guilty to this count. The indictment did not refer to New Jersey's hate crime statute,[26] which allows an enhanced sentence of up to twenty years if the trial judge finds by a preponderance of the evidence that the defendant's purpose was racial intimidation.[27] After finding such a purpose, the trial judge imposed a twelve-year sentence on Apprendi, two years greater than the statutory maximum for possessing a firearm. Apprendi challenged the sentence on the ground that the hate crime sentence enhancement violated the United States Constitution.

B. The Result in New Jersey State Courts

Despite contrary testimony, the trial judge found by a preponderance of the evidence "that the crime was motivated by racial bias."[28] The state appellate court upheld the sentence, finding that the New Jersey legislature decided to make the hate crime enhancement a "sentencing factor" rather than an element of the underlying offense.[29] A divided New Jersey Supreme Court affirmed, reasoning that "the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor."[30] The Supreme Court reversed by a margin of five to four, with the majority consisting of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg.[31]

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[24] All of the facts are found in *Apprendi v. New Jersey*, 530 U.S. 466, 469-474 (2000). Many of the facts are duplicated from the Introduction to facilitate understanding and allow for citations to the relevant New Jersey statutory provisions.

[25] N.J. STAT. ANN. § 2C:39-4(a) (West 1995) (prohibiting possession of weapons for unlawful purposes).

[26] N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000).

[27] N.J. STAT. ANN. § 2C:43-7(a)(3) (West Supp. 2000).

[28] *Apprendi*, 530 U.S. at 471.

[29] *Id.* The appellate court's decision is *State v. Apprendi*, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997).

[30] State v. Apprendi, 731 A.2d 485, 494-95 (N.J. 1999).

[31] Apprendi v. New Jersey, 530 U.S. 466 (2000).

C. The Majority Opinion (Justice Stevens)

Justice Stevens began his analysis by noting that the Court was not considering the constitutionality of hate crime laws, but rather was considering the constitutionality of the sentencing procedure in New Jersey.[32] The answer to whether Apprendi had a constitutional right to have a jury determine racial bias beyond a reasonable doubt was foreshadowed by *Jones v. United States*,[33] where the Court noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[34] The Fourteenth Amendment extends the Fifth Amendment protection to cases involving state statutes.[35] Stevens found that these rights "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[36]

Stevens next examined the historical bases for the ruling. Throughout history, courts have recognized the right to trial by jury and the right to have a jury verdict based on proof beyond a reasonable doubt on every element of the crime.[37] Distinctions between "sentencing factors" and "elements" of offenses were not recognized throughout history.[38] Trial judges exercised discretion while imposing sentences *within* statutory limits, but their discretion was bound by the sentencing range prescribed by the legislature.[39] This brief historical overview "highlight[s] the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[40]

Stevens then considered precedent. Generally, a state cannot circumvent due process protections by redefining the elements of a crime and characterizing them as bearing solely on the extent of punishment.[41] In 1986, however, the Court allowed a judge to use "sen-

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[32] *Id.* at 474-75.

[33] 526 U.S. 227 (1999). *Jones* is also discussed *infra* Part II.B.

[34] *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

[35] *Id.*

[36] *Id.* at 477 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

[37] *Id.* at 478. *See also In re* Winship, 397 U.S. 358, 361 (1970) (tracing the reasonable doubt requirement back to our early days as a nation).

[38] *See Apprendi*, 530 U.S. at 478 (explaining the history of the reasonable doubt requirement).

[39] *See id.* at 481 (limiting the court's discretion to the punishments fixed by law).

[40] *Id.* at 482-83 (emphasis omitted).

[41] *See id.* at 485. *See also* discussion *infra* Part II.A.

tencing factors" to determine which sentence to impose within the statutory range.[42] At the same time, the Court stressed "the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense and (2) that a state scheme that keeps from the jury facts that expos[e] [defendants] to greater or additional punishment may raise serious constitutional concern."[43] Stevens also distinguished a case where the Court allowed a judge to consider *prior convictions* while imposing a sentence exceeding the statutory maximum.[44] A jury passed upon the defendant's guilt as to those prior convictions beyond a reasonable doubt, thereby mitigating any due process concerns.[45] Thus, the constitutional rule articulated by Stevens is: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[46]

The New Jersey scheme basically allowed a jury to convict a defendant of a second-degree offense and impose punishment for a first-degree offense.[47] Apprendi's "purpose" was more than a sentencing factor, and in fact comprised the essential mens rea of the crime.[48] The unconstitutional effect of New Jersey's scheme was to provide greater punishment than that authorized by the jury's verdict: "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'"[49] New Jersey's scheme "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."[50]

D. The Concurring Opinions (Justices Scalia and Thomas)

Justices Scalia and Thomas favored a broader rule that would extend *Apprendi* to require prosecutors to try *all* factors relevant to sentencing to a jury. Scalia thought the criminal should never get a

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[42] *See* discussion *infra* Part II.B concerning *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

[43] *Apprendi*, 530 U.S. at 486 (citing *McMillan*, 477 U.S. at 85-88) (alterations in original) (citations omitted).

[44] *See* discussion *infra* Part II.B concerning *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

[45] *Apprendi*, 530 U.S. at 488. Stevens noted that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Id.* at 489.

[46] *Id.* at 490.

[47] *Id.* at 491.

[48] *See id.* at 493 ("The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'").

[49] *Id.* at 495 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

[50] *Id.* at 497.

greater punishment than he "bargained for when he did the crime," and if he got a lesser sentence "he may thank the mercy of a tender-hearted judge."[51] The Constitution guarantees trial by jury, "[a]nd the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury,' has no intelligible content unless it means that all facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury."[52]

Justice Thomas proposed extending the majority's holding to require the trying of recidivism (i.e., evidence of prior crimes) to the jury. Thomas thought the entire issue came down to the definition of "elements" of a crime: "[A] fact that is by law the basis for imposing or increasing punishment is an element."[53] Basically, an indictment must allege all the elements of the offense.[54] For example, if punishment in a larceny case is predicated upon the value of the items stolen, a jury must pass judgment upon the value.[55]

The same traditionally has been true of recidivism: "[T]he fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime."[56] Since prior convictions provide a basis for imposing or increasing punishment, they are elements of the offense that must be proven to a jury.[57] Thus, Thomas questioned the results in all cases allowing judges to consider any sentencing factor by a preponderance of the evidence, and saw *Apprendi* as a return to "the status quo that reflect[s] the original meaning of the Fifth and Sixth Amendments."[58]

E. The Dissenting Opinions (Justices O'Connor and Breyer)

Justices O'Connor and Breyer wrote strong dissents. Chief Justice Rehnquist joined both opinions, and Justices Kennedy and Breyer joined O'Connor. Justice O'Connor saw the majority opinion as "a

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[51] *Id.* at 498 (Scalia, J., concurring).

[52] *Id.* at 499 (second alteration in original) (emphasis omitted).

[53] *Id.* at 502 (Thomas, J., concurring). Thomas proceeded to cite numerous cases standing for this proposition. *See id.* at 502-09.

[54] Thomas cited extensively to a nineteenth century treatise on criminal procedure. *See* 1 JOEL BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 51 (2d ed. 1872) ("[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted . . . .").

[55] *Apprendi*, 530 U.S. at 502 (Thomas, J., concurring) (explaining that a court could not sentence a defendant to a term for grand larceny when the indictment had not set out the value of the stolen goods).

[56] *Id.* at 507.

[57] *See id.* at 511.

[58] *Id.* at 518.

watershed change in constitutional law."[59] She claimed none of the history contained in the Court's opinion supported the "increase in the maximum penalty" rule adopted by the Court.[60] O'Connor believed the Court clearly rejected such a broad rule in a previous decision,[61] and criticized the majority for failing to admit it was overruling precedent.[62] To support her view, O'Connor pointed out the apparent conflict with allowing judges to consider aggravating and mitigating circumstances to impose either the death penalty or life imprisonment following a first-degree murder conviction.[63]

O'Connor also criticized the majority's failure to clarify the contours of its ruling. She noted that New Jersey could rewrite the weapons possession statute to provide a range of five to twenty years' imprisonment, and then provide in the same statute that a racially motivated crime would require a sentence of greater than ten years.[64] Thus, she saw the majority's ruling as formalistic. Further, O'Connor viewed New Jersey's statutory scheme as preferable to a scheme that places all of the sentencing discretion with the trial judge. At least New Jersey—like the Federal Sentencing Guidelines—provided judges with factors to consider to promote uniform sentencing.[65] O'Connor worried that the Court's decision threatened to invalidate significant sentencing reform accomplished over the past three decades, and called into question the sentences imposed in thousands, if not millions, of state and federal cases.[66]

Justice Breyer echoed Justice O'Connor's concerns. Breyer took a practical view of the problem and stated that, while the majority promoted a procedural ideal, "the impractical nature of the requirement . . . supports the proposition that the Constitution was not intended to embody it."[67] Breyer reiterated O'Connor's concerns about inconsistent sentencing before the Guidelines were established, and suggested there are too many potentially relevant sentencing factors to submit to a jury.[68] Breyer also noted the contradiction inherent in

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[59] *Id.* at 524 (O'Connor, J., dissenting).

[60] *Id.* at 526.

[61] *Id.* at 530. O'Connor cited *Patterson v. New York*, 432 U.S. 197 (1977), to support her view. *Patterson* is discussed *infra* Part II.A.

[62] *Apprendi*, 530 U.S. at 532-33 (O'Connor, J., dissenting). O'Connor thought the Court overruled *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which is discussed *infra* Part II.B.

[63] *Apprendi*, 530 U.S. at 537 (O'Connor, J., dissenting) ("If a State can remove from the jury a factual determination that makes the difference between life and death . . . it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.").

[64] *Id.* at 540-41 (O'Connor, J., dissenting).

[65] *Id.* at 544-50.

[66] *Id.* at 550-52.

[67] *Id.* at 555 (Breyer, J., dissenting).

[68] *Id.* at 555-58.

not allowing a judge to consider facts justifying a higher sentence and allowing legislatures simply to increase the statutory maximum penalties.[69] Finally, Breyer echoed O'Connor's concern about the effect of the ruling on the criminal justice system itself. Legislatures wrote statutes believing they could allow judges to increase statutory maximum penalties based on sentencing factors, and *Apprendi* calls into doubt all of the sentences imposed in convictions obtained under those statutes.[70]

II. BACKGROUND: THE PRE-*APPRENDI* EVOLUTION OF SENTENCING

When one examines the cases preceding *Apprendi*—particularly the cases cited in the various opinions—the surprise and dismay expressed by Justices O'Connor and Breyer become somewhat difficult to understand. While some legislatures may have misread precedent, the Court can hardly be blamed for such misreading. As discussed below, the general common law rule has always been that any element of the statutory offense had to be proven by the prosecution and found by a jury beyond a reasonable doubt. This rule remained in effect after 1986, except legislatures could remove elements from statutes and make them "sentencing factors" considered by a judge by a preponderance of the evidence. The Supreme Court, however, never allowed judges to increase sentences beyond the statutory maximum. *Apprendi* merely restated this basic rule and stressed the need to present factors increasing the maximum penalty to a jury.

A. *The Pre-*McMillan *Approach to Elements of Offenses*

Before 1986, courts understood that any factor affecting punishment was an element of the offense upon which a jury had to pass judgment beyond a reasonable doubt.[71] The Supreme Court reiterated this basic understanding in *In re Winship*,[72] decided in 1970: "[T]he Due Process Clause protects the accused against conviction except

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[69] *Id.* at 563-64 ("I do not understand why, when a legislature authorizes a judge to impose a higher penalty for bank robbery (based, say, on the court's finding that a victim was injured or the defendant's motive was bad), a new crime is born; but where a legislature requires a judge to impose a higher penalty than he otherwise would (within a pre-existing statutory range) based on similar criteria, it is not.") (emphasis omitted).

[70] *Id.* at 565 ("[T]he rationale that underlies the Court's rule suggests a principle – jury determination of all sentencing-related facts – that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to commissions).").

[71] Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1078 (1999) ("If the fact in dispute was part of the statutory scheme and directly related to the defendant's level of punishment, then it had to be (1) alleged in the indictment, (2) proved to the jury, and (3) proved beyond a reasonable doubt in order to sustain the sentence imposed.").

[72] 397 U.S. 358 (1970).

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[73] The *Winship* Court, however, did not clarify exactly what "facts" the case referred to. The Court attempted to clarify the contours of *Winship* over the next decade, specifically with its decisions in *Mullaney v. Wilbur*[74] and *Patterson v. New York.*[75]

Mullaney interpreted Maine statutes distinguishing between murder and manslaughter.[76] To avoid a murder conviction, Maine courts required the *defendant* to prove the killing was committed without malice aforethought or in the heat of passion.[77] The Supreme Court held this was unconstitutional under the Due Process Clause because malice aforethought was an element of the crime of murder and the *prosecution* had to prove every element of the offense, including the absence of passion, beyond a reasonable doubt.[78] The Court also expressed reluctance to allow state legislatures to define away elements of the offense by eliminating them from the statute. Allowing such statutes would elevate formalism above the substantive protections afforded by the Constitution.[79]

The Court seemed to back away from its broad reading of *Winship* in *Patterson*, and in the process "opened the door for creative legislatures to evade the fundamental protections afforded in *Winship* by carefully drafting their statutes."[80] *Patterson* dealt with a distinction between second-degree murder and manslaughter under New York law. The prosecution had to prove two elements to obtain a second-degree murder conviction in New York: (1) "intent to cause the death of another person" and (2) "caus[ing] the death of such person or of a third person."[81] A person was guilty of manslaughter if he intentionally killed another person "under circumstances which [did]

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[73] *Id.* at 364. The Court also rejected the contention that "there is . . . only a 'tenuous difference' between the reasonable doubt and preponderance standards." *Id.* at 367.

[74] 421 U.S. 684 (1975).

[75] 432 U.S. 197 (1977).

[76] The Maine murder statute read: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." The manslaughter statute read: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years." *Mullaney*, 421 U.S. at 686 n.3 (alteration in original).

[77] *Id.* at 686-87.

[78] *Id.* at 704.

[79] *Id.* at 698-99 ("[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. . . . *Winship* is concerned with substance rather than this kind of formalism.").

[80] Knoll & Singer, *supra* note 71, at 1081.

[81] Patterson v. New York, 432 U.S. 197, 198 (1977) (alterations in original).

not constitute murder because he act[ed] under the influence of extreme emotional disturbance."[82] Thus, a defendant charged with second-degree murder had to prove by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance.

The Supreme Court upheld this scheme because, unlike the Maine statute in *Mullaney*, New York did not include malice aforethought as an element of murder. Basically, if a state satisfies the mandate of *Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [a defendant] is charged,"[83] then the state may shift the burden of proof for an affirmative defense to the defendant.[84] Important for the purposes of this Note, the Court observed that "there are obviously constitutional limits beyond which the States may not go" in defining away elements of crimes.[85] The Court reached one of those limits—defining away elements of crimes that increase the statutory maximum sentence—in *Apprendi*.

B. The Approach to Sentencing Between McMillan *and* Apprendi

In 1986, the Court decided *McMillan v. Pennsylvania*,[86] and in the process showed how *Patterson*'s logic applied in a sentencing context. *McMillan* dealt with Pennsylvania's Mandatory Minimum Sentencing Act,[87] which provided a mandatory minimum sentence of five years' imprisonment for those convicted of certain enumerated offenses if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the offense.[88] Most important for our purposes, the statute did "not authorize a sentence in excess of that otherwise allowed for that offense."[89] Thus, a Pennsylvania judge could not sentence a defendant to more than the statutory maximum by determining the visible possession of a firearm: "The statute gives no impression of having been tailored to permit the visible possession to be a tail which wags the dog of the substantive offense."[90]

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[82] *Id.* at 199.

[83] *In re* Winship, 397 U.S. 358, 364 (1970).

[84] *See Patterson*, 432 U.S. at 210 ("We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.").

[85] *Id.*

[86] 477 U.S. 79 (1986).

[87] 42 PA. CONS. STAT. § 9712 (1982).

[88] *McMillan*, 477 U.S. at 81.

[89] *Id.* at 82.

[90] *Id.* at 88.

The Court, in a five-to-four opinion delivered by then-Justice Rehnquist,[91] upheld the constitutionality of the statute because the Pennsylvania legislature expressly provided that visible possession was not an element of the offense, but rather was a *sentencing factor* that came into play only after conviction.[92] The statute did not violate due process, but rather merely took a factor already considered by judges and gave it the precise weight desired by the legislature.[93] Justice Stevens—author of the *Apprendi* majority opinion—dissented, arguing the increased minimum also required proof to a jury beyond a reasonable doubt, even though the sentence remained within the statutory range.[94]

After *McMillan*,[95] legislatures began to expand the judge's ability to consider sentencing factors, prosecutors began to argue that facts might not be elements, and "courts retreated to the usual approaches of statutory construction – grammatical parsing, legislative history and intent, statutory maxims, and the like."[96] One only has to look to *Castillo v. United States*,[97] decided three weeks before *Apprendi*, for an example of such microanalysis.[98] For our purposes, however, the only important consideration is that the Supreme Court never explicitly allowed judges to sentence above the statutory maximum by considering sentencing factors other than prior convictions. Judges could

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[91] This makes one wonder why Rehnquist dissented in *Apprendi*, since the *Apprendi* majority merely applied the "increase in the statutory maximum" limitation found in *Patterson*.

[92] *McMillan*, 477 U.S. at 85-86. This was the first time the Court ever used the term "sentencing factor."

[93] *Id.* at 89-90.

[94] *Id.* at 103 (Stevens, J., dissenting) ("[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of . . . *In re Winship*."). It is interesting to note that Stevens actually retreated in *Apprendi* by only calling into question sentencing factors allowing for penalties above the statutory maximum. The *Apprendi* test is much more limited and concrete than the "special stigma/punishment" standard Stevens articulated in *McMillan*.

[95] Several authors have criticized *McMillan* and its progeny, but such criticism is beyond the scope of this Note. *See, e.g.*, Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992) (disagreeing with *McMillan* and finding no reason to treat sentencing factors differently than elements of the offense); Knoll & Singer, *supra* note 71 (criticizing *McMillan* and the attempts by legislatures and courts to stretch its limits, particularly in the drug context).

[96] *See* Knoll & Singer, *supra* note 71, at 1085. The authors note that courts have used a number of methods to resolve the issue of whether a fact is an element of a crime or a mere sentencing factor. "These methods include: (1) examining the placement within the statute of the fact in question, (2) whether the fact is easy or difficult to prove, and (3) the potential prejudice to the defendant of having the disputed fact presented to the jury." *Id.* The authors specifically refer to the amount of drugs in federal drug sentencing, discussed *infra* Part III.B.1.

[97] 530 U.S. 120 (2000).

[98] *Id.* at 124-26 (discussing the placement of dashes and subsections to determine legislative intent and the desirability of allowing a jury, rather than a judge, to determine whether a defendant carried a machine gun).

only consider factors *within* the sentencing range by a preponderance of the evidence.

The prior conviction distinction emerged with the Court's decision in *Almendarez-Torres v. United States*.[99] A federal statute forbids deported aliens from returning to the United States without special permission, and authorizes a maximum prison term of two years.[100] A subsection of the statute authorizes a maximum prison term of twenty years if the initial deportation followed a felony conviction.[101] The Court, with Justice Breyer writing the five-to-four majority opinion, found the statute constitutional because a prior conviction "is as typical a sentencing factor as one might imagine."[102] He further justified the exception by arguing a "permissive maximum" is less harmful to a defendant than *McMillan*'s higher "mandatory minimum" because judges are not bound by statutory maximums, whereas they are bound by the minimum.[103] As in *Castillo*, Breyer focused on legislative intent, parsing every word, phrase, comma, and colon, and concluded Congress intended prior convictions to operate as sentencing factors.[104]

The final case providing the handwriting on the wall before *Apprendi* was *Jones v. United States*.[105] Jones was indicted for, among other things, violating the federal carjacking statute,[106] which carried a maximum fifteen-year sentence.[107] At the sentencing hearing following conviction, the judge determined by a preponderance of the evidence that serious bodily injury resulted from the carjacking, which increased the statutory maximum to twenty-five years.[108] The Court, in a five-to-four opinion written by Justice Souter, struck down the provision allowing the increased maximum sentence.[109] Justice Souter concluded Congress "intended serious bodily injury to be an element defining an aggravated form of the crime."[110] He noted that the *McMillan* Court did not authorize judges to consider factors in-

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[99] 523 U.S. 224 (1998).

[100] 8 U.S.C. § 1326 (1994).

[101] *Almendarez-Torres*, 523 U.S. at 226 (citing 8 U.S.C. § 1326(b)(2) (1994)).

[102] *Id.* at 230. Interestingly, the swing vote from this case to *Apprendi* was Justice Thomas, who in two years has apparently changed his mind and decided recidivism is an element that must be charged to the jury and proved beyond a reasonable doubt.

[103] *Id.* at 244-45 ("[T]he risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue.").

[104] *Id.* at 230-35.

[105] 526 U.S. 227 (1999).

[106] 18 U.S.C. § 2119 (1988).

[107] *Jones*, 526 U.S. at 231.

[108] 18 U.S.C. § 2119(2) (1988).

[109] *Jones*, 526 U.S. at 231. The breakdown of the justices was the same as in *Apprendi*.

[110] *Id.* at 236.

creasing the statutory maximum penalty,[111] and distinguished *Almendarez-Torres* as dealing with recidivism.[112] The Court relegated the rule ultimately adopted by *Apprendi* to a footnote.[113] After *Jones*, the result in *Apprendi* should have surprised no one.

III. FALLOUT: APPROACHES TO SENTENCING IN THE WAKE OF *APPRENDI*

While the rule articulated in *Apprendi* might encourage a large number of convicts and defendants to argue its applicability to their cases,[114] the rule will not actually affect many classes of federal cases.[115] Some of the classes affected are rather large,[116] and others are smaller,[117] but for the most part judges sentence within the statutory range. Thus, this section begins with a discussion of areas *Apprendi* will *not* affect. The Note will then conclude with two representative examples of *Apprendi*'s impact on federal statutory sentencing schemes.

A. Apprendi's *Minimal Impact*

Most of the cases decided in *Apprendi*'s aftermath hold *Apprendi* inapplicable to the facts at issue. First, courts are refusing to apply *Apprendi* retroactively to cases on collateral review, mainly because *Apprendi* technically announced a new rule and the Supreme Court did not expressly declare retroactivity. Second, in the vast majority of cases, the sentences imposed were within the statutory range, even if the judges were allowed to consider factors that could have increased the statutory maximum. These courts held *Apprendi* does not apply where the defendant receives a sentence below the statutory maximum. Finally, until the Supreme Court addresses the concerns expressed by Justices Stevens and Thomas about *Almendarez-Torres*,

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[111] *Id.* at 242 ("[The *McMillan* Court] observe[d] that the result might have been different if proof of visible possession had exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact.").

[112] *Id.* at 249 ("A prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

[113] So I will follow suit. "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6.

[114] *See A Revolution in Sentencing?*, WASH. POST, August 29, 2000, at A16 ("The litigation *Apprendi* is unleashing will offer ample opportunities for the court to begin clarifying its principle."). Other than the possibility of including recidivism under the rule, however, there is very little to clarify.

[115] As stated earlier, this Note does not attempt to address possible effects under state statutes, nor does it attempt to address implications under the United States Sentencing Guidelines. Thus, the two examples will focus on federal statutory sentencing schemes.

[116] *See infra* Part III.B.1 (dealing with sentencing under a federal drug statute).

[117] *See infra* Part III.B.2 (dealing with sentencing under the Sherman Act).

judges can consider prior convictions to impose sentences in excess of the statutory maximum.

1. Retroactivity

A concern emphatically expressed by Justices O'Connor and Breyer in their dissents in *Apprendi* was the potential for gridlock as prisoners sought collateral review of their sentences. The Chief Judge of the Third Circuit has noted the filing of seventeen habeas petitions over a six-week period by prisoners citing *Apprendi* and seeking collateral review.[118] While concerns about the volume of appeals *filed* may be legitimate, it does not appear that *Apprendi* will apply retroactively. Thus, judges should be able to summarily dismiss any collateral appeals filed because prisoners think their sentences violate the *Apprendi* rule.

The lead case on retroactivity and post-conviction proceedings is *Teague v. Lane*.[119] Generally, new constitutional rules of criminal procedure should not be applied retroactively to cases on collateral review.[120] The relevant exception for our purposes is that a new rule should be applied retroactively "if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[121] This exception refers to "watershed rules of criminal procedure,"[122] and should apply very narrowly to cases where failure to apply the new rule will undermine the fairness of convictions or seriously diminish the accuracy of convictions.[123] In addition, the Supreme Court has stated that it will announce retroactivity, either in the lead case or in subsequent cases.[124]

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[118] United States v. Mack, 229 F.3d 226, 237 n.1 (3d Cir. 2000) (Becker, C.J., concurring) *cert. denied*, 121 S. Ct. 2015 (2001).

[119] 489 U.S. 288 (1989).

[120] *Id.* at 305 (O'Connor, J., concurring). Note, however, that new rules *are* applicable to cases on *direct* review. Thus, if a trial judge or jury convicts a defendant, and the Supreme Court then adopts a new rule of constitutional criminal procedure, the new rule applies on the defendant's appeal. *See, e.g.*, United States v. Nicholson, 231 F.3d 445, 453 (8th Cir. 2000), (citing Powell v. Nevada, 511 U.S. 79, 80 (1994)), and Griffith v. Kentucky, 479 U.S. 314, 328 (1987)) ("The government has raised no procedural impediments to our considering the issue, and, in any event a new constitutional criminal procedure is normally applied retroactively to all cases pending on direct review."), *cert. denied*, 121 S. Ct. 1244 (2001); State v. Guice, 541 S.E.2d 474 (N.C. Ct. App. 2000) (holding *Apprendi* rule applies on direct review and remanding for resentencing). In contrast, this Note considers whether a new rule, such as the one articulated in *Apprendi*, applies on *collateral* review, when a defendant has already exhausted all of his direct appeals.

[121] *Teague*, 489 U.S. at 307 (O'Connor, J., concurring) (alteration in original) (citations omitted).

[122] *Id.* at 311.

[123] *Id.* at 315.

[124] *Id.* at 300-01.

The threshold question, of course, is whether *Apprendi* announces a new rule. *Teague* defines a new rule as one "not dictated by precedent existing at the time the defendant's conviction became final."[125] In *Sawyer v. Smith*,[126] the Court noted that "*Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered."[127] In other words, if an old rule confuses lower courts, the Supreme Court's clarification of the old rule qualifies as a "new" rule under *Teague*.[128] Thus, even if *Apprendi* did not articulate a rule any different from existing precedent, it did synthesize and clarify a rule that caused confusion among reasonable courts. While not actually "new" after thoroughly examining precedent, the *Apprendi* rule is technically "new" under *Teague* because of the confusing application of sentencing laws in the lower courts.[129]

The question then becomes whether *Apprendi* qualifies as a "watershed change" that diminishes the accuracy of convictions obtained under the old rule. The Supreme Court has never invoked this exception to the general rule that new rules do not apply to cases on collateral review.[130] Several circuits, however, have retroactively applied the rule of *Cage v. Louisiana*,[131] which held a jury instruction that lowered the reasonable doubt standard violated the defendant's due process rights. The Third Circuit applied *Cage* retroactively because the incorrect reasonable doubt instruction "necessarily implicate[d] the fundamental fairness of the proceeding in a manner that call[ed] the accuracy of its outcome into doubt."[132]

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[125] *Id.* at 301 (emphasis omitted).

[126] 497 U.S. 227 (1990).

[127] *Id.* at 234.

[128] Note, however, that if the Court merely restates an old rule where there was no cause for confusion in the lower courts, the Court's decision would be retroactive. *Id.* at 246 (Marshall, J., dissenting) (noting that "[i]n such circumstances, a defendant is entitled to the retroactive benefit of the decision he seeks to invoke"). Conceiving of such a set of circumstances is admittedly difficult.

[129] The post-*Apprendi* courts addressing the issue unanimously agree. *See, e.g.*, Jones v. Smith, 231 F.3d 1227, 1236-38 (9th Cir. 2000) (holding that *Apprendi*'s new rule does not apply retroactively); West v. United States, 123 F. Supp. 2d 845, 846-47 (D. Md. 2000) *aff'd* 246 F.3d 671 (4th Cir. 2001) (noting the Supreme Court has never identified any "watershed principle" that warranted retroactive application). *See also* cases cited *infra* notes 137, 139-40.

[130] *See* United States v. Sanders, 247 F.3d 139, 148 (4th Cir. 2001) (holding *Apprendi* does not apply retroactively and noting that "since *Teague*, the Court has yet to find a single rule that qualifies under the [watershed rule] exception"); United States v. Gibbs, 125 F. Supp. 2d 700, 704 (E.D. Pa. 2000) (noting "[the Court] has yet to invoke the [watershed rule] exception.").

[131] 498 U.S. 39 (1990) (per curiam). For a listing of the circuits applying *Cage* retroactively, see *Gibbs*, 125 F. Supp. 2d at 704.

[132] West v. Vaughn, 204 F.3d 53, 61 (3d Cir. 2000).

In *Neder v. United States*,[133] however, the Supreme Court refused to overturn a conviction where the trial judge failed to submit the element of materiality to the jury because "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair."[134] The failure to submit a sentencing factor to a jury does not call into question the accuracy of the underlying conviction, but rather is analytically similar to the materiality element in *Neder*. As such, the *Apprendi* rule does not constitute a "watershed change" and should not apply retroactively.[135]

Most courts addressing the retroactivity question after *Apprendi* have failed to grant petitions for collateral review[136] because the Supreme Court did not explicitly command retroactive application of the *Apprendi* rule[137] and *Teague* does not mandate retroactivity.[138] The Supreme Court could subsequently declare the retroactivity of *Apprendi*,[139] but such a declaration seems unlikely considering the language of *Teague*. Applying *Apprendi* retroactively would merely serve to decrease prisoners' sentences and would not serve to bring their convictions into question. Juries passed upon the guilt of defen-

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[133] 527 U.S. 1 (1999), *remanded* 197 F. 3d 1122 (11th Cir. 1999), *cert. denied* 530 U.S. 1261 (2000).

[134] *Id.* at 9 (emphasis omitted).

[135] *See* United States v. Johnson, 126 F. Supp. 2d 1221, 1225-26 (D. Neb. 2000) ("Essentially, the shifting of an element of the offense from the judge to the jury, and requiring proof of such element beyond a reasonable doubt rather than by a preponderance of the evidence, does not directly relate to the accuracy of the conviction or sentence, nor does it implicate fundamental fairness."); *Gibbs*, 125 F. Supp. 2d at 706 ("The lack of a jury finding as to drug quantity and the lack of such a finding made beyond a reasonable doubt does not call into question the validity of a verdict in the way a faulty reasonable doubt instruction does.").

[136] Petitions for collateral review are filed pursuant to the federal habeas corpus statute, 28 U.S.C. § 2255 (1994).

[137] *See, e.g.*, Browning v. United States, 241 F.3d 1262, 1266 (10th Cir. 2001) ("To date, the Court simply has been silent on the repercussions of *Apprendi*. No language in *Apprendi* or in the Supreme Court's later decisions even hints at the Court's decision to make the rule retroactive to cases on collateral review."); Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000) (quoting *In re* Vial, 115 F.3d 1192, 1197 (4th Cir. 1997)) ("[A] new rule of constitutional law has been 'made retroactive to cases on collateral review by the Supreme Court' within the meaning of § 2255 only when the Supreme Court declares the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding."), *cert. denied* 121 S. Ct. 1364 (2001); Hernandez v. United States, 226 F.3d 839, 841 (7th Cir. 2000) ("[A] new rule that is retroactive for purposes of collateral attack is not 'available' for a § 2255 motion until the Supreme Court has clearly ruled that this is the case.") (quoting Gray-Bey v. United States, 209 F.3d 986, 988 (7th Cir. 2000)); *In re* Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000) (agreeing with the First Circuit "that the Supreme Court has not declared *Apprendi* to be retroactive to cases on collateral review").

[138] *See* cases cited *supra* note 129.

[139] *See Sustache-Rivera*, 221 F.3d at 15 n.12 ("The Supreme Court may yet hold that the *Jones/Apprendi* rule is to be retroactively applied to cases on collateral review."); Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000) ("If the Supreme Court ultimately declares that *Apprendi* applies retroactively to cases on collateral attack, we will authorize successive collateral review of cases to which *Apprendi* applies. Until then prisoners should hold their horses and stop wasting everyone's time with futile applications.").

dants beyond a reasonable doubt, and trial judges enhanced their sentences by considering sentencing factors. *Teague* was concerned with the accuracy of the *conviction*, not the accuracy of the sentence. Thus, because *Apprendi* announces a new rule that does not constitute a "watershed change" under *Teague*, *Apprendi* should not apply retroactively to cases on collateral review.[140] The "gridlock" concerns of Justices O'Connor and Breyer seem misplaced.

2. *Sentences Within the Statutory Range*[141]

As discussed in Parts I and II, the *Apprendi* rule only applies when the judge sentences defendants to a sentence *longer* than the statutory maximum. When the sentence remains within the statutory range, judges can consider any factors they deem relevant by a preponderance of the evidence. For example, if a larceny statute provides a statutory maximum sentence of five years, the judge can still consider the value of the stolen items by a preponderance of the evidence in order to determine a sentence within the range. Most federal courts are correctly following the *Apprendi* rule by requiring a jury to pass upon a factor beyond a reasonable doubt *only if* the factor increases the statutory maximum penalty.[142]

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[140] *But see* United States v. Murphy, 109 F. Supp. 2d 1059, 1063 (D. Minn. 2000), in which the district court held *Apprendi* applies retroactively because it deals with "'watershed rules of criminal procedure' which 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding' and 'without which the likelihood of an accurate conviction is seriously diminished.'" (quoting Sawyer v. Smith, 497 U.S. 227, 242-44 (1990) (quoting *Teague*, 489 U.S. at 311, 315)). The court did not explain how the accuracy of the conviction is diminished, and its analysis seems flawed for the reasons set forth in the text. *See also* People v. Beachem, 740 N.E.2d 389, 394-95 (Ill. App. Ct. 2000), in which the Illinois court held *Apprendi* applied retroactively, but did not question the accuracy of the conviction itself. Rather, the court focused on the inequity inherent in allowing a defendant to remain in prison for an amount of time in excess of the statutory maximum based on facts never proven to a jury beyond a reasonable doubt. *Id.* While the argument seems compelling, it misconstrues *Teague*, which seemed concerned only with the accuracy of the conviction, not the sentence.

[141] This topic will be further addressed *infra* Part III.B.1 in connection with federal drug sentencing.

[142] *See* United States v. Garcia, 240 F.3d 180, 181-84 (2d Cir. 2001) (holding a sentencing enhancement did not exceed the statutory maximum sentence in a food stamp fraud case), *cert. denied*, 121 S. Ct. 2615 (2001); United States v. Corrado, 227 F.3d 528, 540-42 (6th Cir. 2000) (holding a sentencing enhancement under the Sentencing Guidelines did not exceed the statutory maximum sentence in a RICO conspiracy case); United States v. Smith, 223 F.3d 554, 562-66 (7th Cir. 2000) (holding judges could consider sentencing factors in a multi-count indictment including drug conspiracy, possession of drugs, and money laundering); United States v. Carlson, 217 F.3d 986, 987-88 (8th Cir. 2000) (holding judge was allowed to determine whether defendant brandished a firearm during a robbery because the finding merely increased the mandatory minimum, while remaining below the statutory maximum), *cert. denied*, 531 U.S. 1095 (2001); United States v. Hernandez-Guardado, 228 F.3d 1017, 1024-28 (9th Cir. 2000) (holding a two-level sentencing enhancement under the Sentencing Guidelines did not exceed the ten-year statutory maximum for defendant's conspiracy conviction); United States v. Galvez, 108 F. Supp. 2d 1369, 1371-72 (S.D. Fla. 2000) (holding judge could determine the value of stolen perfume in a federal theft case). For application to a hate crime statute in a state court, see State

3. Prior Convictions[143]

Apprendi explicitly exempted prior convictions from its holding because another jury already had the opportunity to pass upon the defendant's guilt beyond a reasonable doubt. Therefore, the same constitutional concerns do not attach to allowing judges to consider prior convictions and impose sentences above the statutory maximum, and *Almendarez-Torres* remains the governing law when considering prior convictions. Note, however, that Justice Stevens "went out of [his] way to cast the future viability of *Almendarez-Torres* into question"[144] by stating "it is arguable that *Almendarez-Torres* was incorrectly decided."[145] As of the time of this writing, however, *Almendarez-Torres* remains good law and courts correctly recognize the exemption of prior convictions from *Apprendi*'s rule.[146]

B. Two Federal Statutes Affected by Apprendi

Apprendi could affect many state and federal statutes, but in the interest of space this Note will focus on sentencing under two federal statutes: a federal drug statute discussed extensively in several post-*Apprendi* cases,[147] and section one of the Sherman Act—a section whose interaction during sentencing with another federal statute has not been discussed in any post-*Apprendi* case.[148] The selection of the statutes is admittedly arbitrary, but the discussion should provide a good illustration of *Apprendi*'s limited, but potentially significant, impact.

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v. Palermo, 765 So. 2d 1155, 1167 (La. Ct. App. 2000) (holding trial judge can consider sentencing factors under a hate crimes statute by a preponderance of the evidence as long as the sentence imposed remains within the statutory range).

[143] This topic will be further addressed *infra* Part III.B.1 in connection with federal drug sentencing.

[144] United States v. Mack, 229 F.3d 226, 238 n.5 (3d Cir. 2000) (Becker, C.J., concurring) *cert. denied*, 121 S. Ct. 2015 (2001). Chief Judge Becker also noted "five sitting Justices are now on record as saying that *Almendarez-Torres* was wrongly decided." *Id.*

[145] *Apprendi*, 530 U.S. at 489.

[146] *See* United States v. Valdovino-Torres, 230 F.3d 1368 (9th Cir. 2000) (unpublished decision) (holding a judge could consider a prior conviction for assault with a firearm as a sentencing factor since *Almendarez-Torres* remains the governing law), *cert. denied*, 531 U.S. 1174 (2001); United States v. Powell, 109 F. Supp. 2d 381, 384 (E.D. Pa. 2000) ("[P]rior convictions . . . are not required to be charged in the indictment . . . [and] prior convictions which increase a defendant's sentence beyond the statutory maximum are sentencing factors, not elements of the crime.").

[147] *See infra* Part II.B.1 (examining sentencing under 21 U.S.C. § 841 (1994)).

[148] *See infra* Part II.B.2 (examining 15 U.S.C. § 1 (1994), and its interaction with 18 U.S.C. § 3571(d)).

1. Drugs: 21 U.S.C. § 841

Apprendi's most dramatic impact could be on federal drug sentencing. In 1999 alone, drug offenses comprised forty-one percent of all federal convictions.[149] The structure of 21 U.S.C. § 841, however, makes it difficult to determine *Apprendi*'s impact. Subsection (a) of the statute defines "unlawful acts" in one sentence,[150] and then subsection (b) defines "Penalties" by referencing drug amounts and prior convictions.[151] The greater the amount of drugs involved in a particular case, the higher the maximum sentence. Prior convictions further raise the maximum penalty. Subsection (b)(1)(C) provides a maximum sentence of twenty years without reference to a specific drug amount.[152] A vast majority of post-*Apprendi* decisions recognize that, in order to obtain a sentence in excess of twenty years, the drug quantity must be determined by a jury beyond a reasonable doubt. Some courts disagree, however, and argue the statutory maximum under §841 is life imprisonment. This disagreement, and the strange structure of the statute, makes this a topic worthy of discussion.

Before *Apprendi*, every circuit court found § 841 constitutional and allowed the judge to determine the amount of drugs involved in the offense by a preponderance of the evidence.[153] The courts reasoned that, once the jury passed upon guilt, drug quantity merely operated as a sentencing factor for the judge to consider when determining the proper sentence.[154] After *Apprendi*, almost all courts admit that drug quantity no longer qualifies as a sentencing factor, but most have found ways to avoid presenting drug quantity to the jury.

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[149] *See Mack*, 229 F.3d at 236 n.1. The federal government obtained more than 23,000 convictions in drug cases in 1999. *Id.*

[150] 21 U.S.C. § 841(a) (1994) ("[I]t shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.").

[151] 21 U.S.C. § 841(b) (1994). The subsection is too lengthy to include. In general, the higher the amount of drugs determined by the judge, the higher the maximum sentence. For example, subsection (b)(1)(A) sets life in prison as the maximum penalty for a violation involving 5 kilograms of cocaine, while subsection (b)(1)(B) sets 40 years as the maximum for a violation involving 500 grams of cocaine. Sentences further increase if death or serious bodily injury results (20 years to life under both scenarios), and if the defendant has a prior conviction (up to life under both scenarios). *See infra* note 155 for a brief discussion of subsections (b)(1)(C) and (b)(1)(D). There are many other subsections, but those mentioned above are most relevant to this Note.

[152] 21 U.S.C. § 841(b)(1)(C) (1994).

[153] *See, e.g.*, United States v. Henderson, 105 F. Supp. 2d 523, 525 (S.D. W. Va. 2000) (collecting cases).

[154] *See* Knoll & Singer, *supra* note 71, at 1091-92 (criticizing courts for classifying the drug quantity as a sentencing factor, and arguing juries should consider drug amounts beyond a reasonable doubt because the drug amount is an element of the offense).

The most common way to circumvent *Apprendi* is by claiming the statutory maximum sentence is twenty years in prison because § 841(b)(1)(C) sets that as the maximum sentence without reference to drug quantity.[155] This maximum increases to thirty years if the defendant has a prior felony conviction.[156] Thus, a vast majority of courts have held that a judge can consider drug quantity by a preponderance of the evidence as long as the ultimate sentence remains under twenty years, but must submit the issue to a jury to determine the issue beyond a reasonable doubt if the prosecution seeks a higher sentence.[157]

For example, consider *United States v. Aguayo-Delgado*.[158] The defendant was convicted of conspiring to distribute methamphetamine, but the indictment did not allege a drug amount.[159] At sentenc-

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[155] 21 U.S.C. § 841(b)(1)(C) (1994) ("In the case of a controlled substance in schedule I or II . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years.").

This subsection sets twenty years as the maximum sentence for offenses involving controlled substances in schedule I or II (these include cocaine, crack, heroin, methamphetamines, etc.) *without regard to drug quantity*. Thus, subsection (b)(1)(C) operates as a default provision. I will not further complicate the point by noting maximum sentences for non-schedule I or II substances, other than to illustrate that the default sentence for marijuana is a five-year maximum. 21 U.S.C. § 841(b)(1)(D). For an illustration of subsection (b)(1)(D), see United States v. Nordby, 225 F.3d 1053, 1059 (9th Cir. 2000) ("[U]nder *Apprendi* the 'prescribed statutory maximum' for a single conviction under § 841 for an undetermined amount of marijuana is five years.").

[156] 21 U.S.C. § 841(b)(1)(C) (1994) ("If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . .").

[157] *See* United States v. LaFreniere, 236 F.3d 41, 49-50 (1st Cir. 2001) (upholding ten-year sentence under the section 841(b)(1)(C) "catchall provision"); United States v. Ramirez, 242 F.3d 348, 352 (6th Cir. 2001) (holding that "when a defendant is found guilty of violating [the drug statute], he must be sentenced under . . . § 841(b)(1)(C) unless the jury has found beyond a reasonable doubt that the defendant possessed the minimum amounts required by § 841(b)(1)(A) and § 841(b)(1)(B)"); United States v. Angle, 230 F.3d 113, 123-24 (4th Cir. 2000) (upholding a sentence of one defendant for less than twenty years and overturning the sentence of another defendant for more than twenty years), *cert. denied*, 122 S. Ct. 309 (2001); United States v. Doggett, 230 F.3d 160, 164-65 (5th Cir. 2000) (holding that the government only has to allege drug quantity in the indictment and prove to a jury beyond a reasonable doubt when it seeks enhanced penalties based on amount of drugs, not when it fails to allege a drug amount and the judge imposes a sentence under twenty years), *cert. denied*, 121 S. Ct. 1152 (2001); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000) (holding that the judge could sentence a defendant with a prior conviction to up to thirty years without requiring the prosecutor to allege drug quantity in the indictment and try the issue to a jury), *cert. denied*, 121 S. Ct. 1163 (2001); United States v. Williams, 235 F.3d 858, 861-63 (7th Cir. 2000) (upholding seven-year sentence because section 841(b)(1)(C) provides a maximum sentence of twenty years), *cert. denied*, 122 S. Ct. 49 (2001); United States v. Garcia-Guizar, 227 F.3d 1125, 1129 (9th Cir. 2000) (holding that a sentence of less than twenty years does not violate *Apprendi* even if the judge considered higher sentences by referencing drug quantity), *cert. denied*, 121 S. Ct. 1629 (2001); United States v. Rogers, 228 F.3d 1318, 1328-29 (11th Cir. 2000) (holding that, if the government fails to allege a drug quantity, a defendant may not be sentenced to more than twenty years, or more than thirty years with a prior conviction).

[158] 220 F.3d 926 (8th Cir. 2000), *cert. denied*, 531 U.S. 1026 (2000).

[159] *Id.* at 928.

ing, the district court considered, among other things, the amount of drugs involved in the offense, and sentenced the defendant to twenty years in prison.[160] Without reference to drug quantity, the defendant faced thirty years in prison under § 841(b)(1)(C) because of his prior felony drug conviction.[161] Thus, the judge's sentence remained under the statutory maximum, and *Apprendi* did not require the prosecution to prove drug quantity to the jury beyond a reasonable doubt.[162]

Obviously, if the jury does determine drug quantity beyond a reasonable doubt, no *Apprendi* problem arises. This is true whether the jury makes a special finding or references the drug quantity found on the jury form.[163] Further, courts hold that no *Apprendi* problem arises if the defendant admits the amount of drugs involved or fails to contest the amount alleged by the prosecution, either in the indictment or plea agreement.[164] This general lack of an impact on sentencing shows *Apprendi*'s limited effect.

Courts applying *Apprendi* to overturn sentences, however, illustrate the potential importance of the Supreme Court's decision. In *United States v. Rebmann*,[165] the defendant pled guilty to distribution of heroin in violation of 21 U.S.C. § 841(a)(1), and understood her maximum term of imprisonment was twenty years.[166] At the sentencing hearing, the judge found by a preponderance of the evidence that the death of the defendant's ex-husband was caused by the heroin distribution, and sentenced the defendant to twenty-four years in prison.[167] The Sixth Circuit held that *Apprendi* required reversal to determine whether the ex-husband's death "was caused by the distri-

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[160] *Id.* at 929.

[161] *Id.* at 930.

[162] *Id.* at 933-34 ("If the non-jury factual determination only narrows the sentencing judge's discretion within the range already authorized by the offense of conviction, such as with the mandatory minimums applied to Aguayo-Delgado, then the governing constitutional standard is provided by *McMillan*.").

[163] *See* United States v. Chavez, 230 F.3d 1089, 1090 (8th Cir. 2000) (upholding life sentence because the jury determined at least 1700 grams of methamphetamine were distributed in violation of 21 U.S.C. § 841(a)(1)); United States v. Sheppard, 219 F.3d 766, 769 (8th Cir. 2000) (upholding sentence because defendant was sentenced to twenty years in prison and jury determined more than 500 grams of methamphetamine were involved in the offense), *cert. denied*, 121 S. Ct. 1208 (2001).

[164] *See* United States v. Cepero, 224 F.3d 256, 257-58 (3d Cir. 2000) (upholding defendant's sentence because the prosecution alleged the drug quantity in the indictment and the defendant accepted a plea agreement, implicitly agreeing to the drug amount stated), *cert. denied*, 531 U.S. 1114 (2001); Doe v. United States, 112 F. Supp. 2d 398, 403 (D.N.J. 2000) (upholding sentence because the defendant was not sentenced beyond the statutory maximum and did not contest his participation in an offense involving at least five kilograms of cocaine).

[165] 226 F.3d 521 (6th Cir. 2000).

[166] *Id.* at 522.

[167] *Id.* Pursuant to 21 U.S.C. § 841(b)(1)(C) (2001), a judge can sentence between twenty years and life "if death or serious bodily injury results."

bution of heroin beyond a reasonable doubt."[168] The cause of death was a factor that increased the statutory maximum sentence, and as such qualified as an element of the offense that required a jury determination.

Of the courts applying *Apprendi*, at least one district court seems to have gotten the issue completely right. In *United States v. Henderson*,[169] the defendant was convicted of, among other things, conspiring and attempting to commit drug offenses in violation of 21 U.S.C. § 841. The indictment did not allege a drug amount, and the jury did not determine the amount.[170] After applying sentencing guidelines and determining the drug quantity, the sentencing range became thirty years to life in prison.[171] The court held it could not sentence the defendant to more than twenty years on each count because "[t]he due process clause and the Sixth Amendment require that drug amounts be treated as an element of a section 841 offense, not a sentencing factor."[172] The court believed *Apprendi* would encourage prosecutors to allege drug quantities in indictments,[173] and concluded by stating: "*Apprendi* prohibits imposing increased statutory penalties pursuant to 21 U.S.C. § 841 unless the specific drug amount is charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt."[174]

An example of a district court getting the analysis wrong is *United States v. Kelly*,[175] where the defendant was charged with possession of marijuana with intent to distribute. The court agreed that a judge could not determine a sentencing factor that *increases* the penalty beyond the statutory maximum, but held it was acceptable for a judge to consider a sentencing factor that *determines* the statutory maximum.[176] In essence, the court viewed the statute as a whole and held that once a jury determines the defendant is guilty of possession with intent to distribute *any* amount of drugs, the judge can determine the amount of drugs to impose the sentence. Under this view, the statutory maximum is life in prison. The court limited *Apprendi* to cases where "the underlying offense charged in the indictment is en-

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[168] *Rebmann*, 226 F.3d at 525.

[169] 105 F. Supp. 2d 523 (S.D. W. Va. 2000).

[170] *Id.* at 523-24.

[171] *Id.* at 527.

[172] *Id.* at 535.

[173] *Id.* ("This court believes that, in light of *Apprendi*, federal prosecutors will allege a specific drug amount in the indictment and prove that fact to a jury even when the government is not seeking increased statutory penalties. . . . Nonetheless, failure to allege the specific drug amount in the indictment is not fatal and does not require dismissal of the criminal action, but instead merely limits punishment to the lowest statutory range provided by the statute.").

[174] *Id.* at 537.

[175] 105 F. Supp. 2d 1107 (S.D. Cal. 2000).

[176] *Id.* at 1114-15.

hanced at sentencing by reference to a fact unrelated to that offense as defined."[177] In the process, the court decided to follow pre-*Apprendi* circuit court unanimity and maintained that drug quantity remains a sentencing factor for the judge to determine by a preponderance of the evidence.[178]

The "increases/determines" distinction of *Kelly* is a distinction without a difference for purposes of *Apprendi*. The views of the *Henderson* court and the *Kelly* court cannot be reconciled, and *Henderson* seems more faithful to the rule of *Apprendi*. Accepting the *Kelly* court's distinction would in effect allow drug quantity to be the "tail" wagging the "dog" of the substantive drug offense when the sentence exceeds the statutory maximum because of the judge's determination. Both *Apprendi* and *McMillan* explicitly rejected similar reasoning, and held that allowing the tail to wag the dog would violate a defendant's Fifth (or Fourteenth) and Sixth Amendment rights. Thus, the correct rule is that if the government desires a sentence in excess of the default statutory maximum (i.e., twenty years), it must allege drug quantity in the indictment and prove it to a jury beyond a reasonable doubt. The Supreme Court will no doubt definitively resolve this issue in the near future.[179]

2. *The Sherman Act: The Interplay Between 15 U.S.C. § 1 and 18 U.S.C. § 3571(d)*

Although never addressed by a court, *Apprendi* could affect the way the DOJ fines individuals and corporations under section one of the Sherman Act.[180] Section one prohibits agreements in restraint of trade, and provides maximum statutory fines of $10 million for a corporation and $350,000 for an individual.[181] While those amounts

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[177] *Id.* at 1114.

[178] *Id.* at 1115; *see also* Jackson v. United States, 129 F. Supp. 2d 1053, 1062, (E.D. Mich. 2001) (following *Kelly* and holding § 841 "contains one crime, narcotics trafficking, with a prescribed range of sentences" for the judge to choose from by considering drug quantity as a sentencing factor).

[179] The Supreme Court has, in fact, granted certiorari in several drug-related cases, and vacated and remanded for reconsideration in light of *Apprendi*. The courts on remand must determine whether drug quantity is an element of a § 841 offense, and as such must be proven to a jury beyond a reasonable doubt, or whether the Constitution allows the judge to consider drug quantity as a sentencing factor. *See* Burton v. United States, 531 U.S. 874 (2000), *vacating* United States v. Crawford, 211 F.3d 125 (5th Cir. 2000) (unpublished table opinion); United States v. Brown, 531 U.S. 922 (2000), *vacating* 207 F.3d 662 (11th Cir. 2000) (unpublished table opinion); United States v. Wims, 531 U.S. 801 (2000), *vacating* 207 F.3d 661 (11th Cir. 2000) (unpublished table opinion); United States v. Gibson, 531 U.S. 801 (2000), *vacating* 187 F.3d 631 (4th Cir. 1999) (unpublished table opinion).

[180] This Note will not discuss the elements of a Sherman Act violation or anything else beyond the narrow focus on possible sentences under § 1.

[181] Section 1 of the Sherman Act reads:

seem rather clear, the standards for imposing fines under the Sherman Act have caused "horripilating confusion."[182] The statutory maximums are *not* the maximums threatened by the DOJ. Pursuant to the Criminal Fines Act,[183] courts can impose fines "not more than the greatest of – the amount specified in the law setting forth the offense; [or] the applicable amount under subsection (d) of this section . . ."[184] Subsection (d) provides for a fine of double the pecuniary gain or loss.[185] This allows the government to calculate the pecuniary gain to the defendant or the pecuniary loss (i.e., overcharge) to customers, take the greater number, and then double it to establish a fine. Thus, a loss of $45 million to customers could equal a $90 million fine, which courts could impose instead of the $10 million statutory maximum under the Sherman Act.

Before predicting *Apprendi*'s impact, it is important to understand the process followed to obtain fines in excess of the statutory maximum. Indictments allege violations of 15 U.S.C. § 1, and never mention the alternative fine possibilities under the Criminal Fines Act.[186] Thus, defendants are sentenced "under an additional statute, not referenced in the indictment . . . as the case was in *Apprendi*."[187] During settlement negotiations, the DOJ reveals the alternative fine provisions in an attempt to get defendants to agree to fines in excess of the

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> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1994).

[182] United States v. Pippin, 903 F.2d 1478, 1480 (11th Cir. 1990).

[183] 18 U.S.C. § 3571 (1994).

[184] 18 U.S.C. § 3571(b), (c) (1994). There are other provisions, but these two are the relevant ones.

[185] The Criminal Fines Act reads:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3571(d) (1994).

[186] *See* Information in United States v. F. Hoffmann-LaRoche, Ltd. (May 20, 1999), *available at* http://www.usdoj.gov/atr/cases/f2400/2452.htm; Information in United States v. Showa Denko Carbon, Inc. (Feb. 23, 1998), *available* at http://www.usdoj.gov/atr/cases/f3800/3815.htm. There are many other indictments-and other legal documents-available for viewing on the DOJ's website (http://www.usdoj.gov).

[187] Doe v. United States, 112 F. Supp. 2d 398, 403 (D.N.J. 2000) (dealing with 21 U.S.C. § 841).

statutory maximum. This process has resulted in defendants agreeing to fines as high as $100 million.[188]

In a 1997 speech, Deputy Assistant Attorney General Gary R. Spratling called § 3571(d) "the double the gain/double the loss standard."[189] All of the cases involving fines in excess of $10 million mentioned by Mr. Spratling involved plea agreements, but section 3571 would seem to allow courts to impose similarly high sentences. While no court has ever applied the alternative fine provisions of § 3571(d) to a Sherman Act case, the threat of such action probably contributed to the high fines agreed to in plea agreements.[190] This "enforcement by negotiation" is effective because "[p]rivate parties remain anxious to negotiate and settle rather than have their business transactions put on indefinite hold and incur the expense and uncertainty of litigation."[191]

Courts have, however, recognized the availability of the alternative fine provisions. In *United States v. Andreas*,[192] the court noted the $350,000 statutory maximum, but agreed with the Government that the alternative fine provisions of section 3571(d) could apply because of the gross disparity between the maximum fine and the financial harm caused by the conspiracy.[193] Interestingly, however, the district court did not impose the alternative fine.[194] Other courts have also recognized the possibility of alternative fine provisions without actually imposing them.[195]

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[188] *See* Gary R. Spratling, Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg? (March 6, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/1583.htm (discussing fines and setting forth a chart with fines obtained in excess of $10 million); *see also* Plea Agreement in *United States v. Showa Denko Carbon, Inc.* (Sept. 8, 1998), *available at* http://www.usdoj.gov/atr/cases/f3800/3869.htm; Plea Agreement in *United States v. F. Hoffmann-LaRoche, Ltd.* (May 20, 1998), *available at* http://www.usdoj.gov/atr/cases/indx136.htm. Showa Denko eventually agreed to a fine of $29 million and F. Hoffmann-LaRoche to $14 million. The $100 million fine was obtained against Archer Daniels Midland. *See* Spratling, *supra*, at 17.

[189] Gary R. Spratling, The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game (March 7, 1997), *available at* http:www.usdoj.gov/atr/public/speeches/4011.htm.

[190] For a discussion of the "enforcement by regulation" methods employed by the Antitrust Division, see Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998). Waller notes the Antitrust Division "negotiate[s] complex consent decrees with private parties in which the courts play only a largely symbolic role in reviewing these decrees." *Id.* at 1394.

[191] *Id.* at 1409, 1427.

[192] United States v. Andreas, No. 96CR762, 1999 WL 116218, at *1 (N.D. Ill. 1999), *cert. denied*, 531 U.S. 1014 (2000).

[193] *Andreas*, 1999 WL 116218, at *1-*2.

[194] *Id.* at *2. The court did not state why it chose the statutory maximum over the alternative fine provisions.

[195] *See* United States v. Haversat, 22 F.3d 790, 793 (8th Cir. 1994) (noting, without mentioning § 3571(d), that individual defendants could have faced fines between $800,000 and $2 million); United States v. Pippin, 903 F.2d 1478, 1483 (11th Cir. 1990) (noting an individual fine cannot exceed the greater of $250,000, twice the pecuniary gain from the offense, or twice

While *Apprendi*'s impact in this area will not be very widespread,[196] it could significantly change the DOJ's approach to obtaining fines in antitrust cases under section one of the Sherman Act. The judge theoretically would determine the gross pecuniary gain/loss by a preponderance of the evidence at the sentencing phase, but likely would merely follow the value contained in the DOJ's sentencing report. Since the gross pecuniary gain/loss increases the statutory maximum penalty, however, *Apprendi* requires that the DOJ allege a value in the indictment and prove it to a jury beyond a reasonable doubt. The DOJ is not likely to do this because "establishing the precise gain or loss in antitrust offenses is often difficult."[197]

Thus, if *Apprendi* prevents the DOJ from utilizing "pecuniary gain or loss" as leverage against antitrust defendants, the likely result is that the statutory maximums spelled out in 15 U.S.C. § 1 will become exactly that—the maximum possible fines faced by individuals and corporations. Unless the DOJ undertakes the difficult task of proving pecuniary gain/loss to a jury beyond a reasonable doubt, or Congress amends the statute, individuals should no longer have to worry about paying more than $350,000, and corporations should no longer worry about paying more than $10 million.

CONCLUSION

Apprendi should not have come as a surprise to anyone familiar with the cases leading up to the decision. *Apprendi* did not actually state a new rule of constitutional law; rather, it merely synthesized existing case law into a clear, concise rule. The rule simply requires prosecutors to submit any factor that increases the statutory maximum penalty to a jury for determination beyond a reasonable doubt, and does not apply to prior convictions or sentences below the statutory maximum. This limited impact means judges will continue to impose most sentences in the traditional fashion—by considering sentencing factors and determining a sentence within the statutory range. For those statutes that are affected by *Apprendi*, such as federal drug statutes and the Sherman Act, judges will have to take care to submit to the jury any element that requires an increase in the statutory maximum. Otherwise, sentencing factors will operate as a tail wagging the

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the gross pecuniary loss to the victim); United States v. Atlantic Disposal Serv., Inc., 887 F.2d 1208, 1212 (3d Cir. 1989) (recognizing that § 3571(d) authorizes courts to impose alternative fines).

[196] Spratling, *supra* note 188, at 14 (pointing out that only nine fines have been obtained in excess of the statutory maximum, and six others have resulted in fines of $10 million).

[197] *Id.* For this reason, the DOJ has suggested increasing the statutory maximum fine under 15 U.S.C. § 1 to $100 million.

dog of the substantive offense. Such an occurrence is no longer—and in fact never was—allowed in the legal world.

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